government, at no distant day, by the children of Chinese parents, and in view of the omission to provide for the children of our own people born abroad, our constitution ought to be amended, and that without delay.

THOMAS P. STONEY.

San Francisco, Cal.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

SINGERLY *v.* THAYER.

T. agreed to put in for S. an elevator "warranted satisfactory in every respect." After trying the elevator, S. refused to accept it.

Held, reversing the court below, that provided he acted in good faith, S. was by the terms of the contract the sole judge whether the elevator was satisfactory.

ERROR to the Common Pleas of Philadelphia County.

This was an action on the case to recover the contract price of an elevator. The facts are sufficiently stated in the opinion which was delivered by

MERCUR, C. J.—This contention arises on a contract contained in the following written proposal, to wit:

FIFTEENTH AND MARKET,
PHILADELPHIA, PA., 8–10–1881.

WM. M. SINGERLY, ESQ.:

I propose to put my Patent Hydraulic Hoist in your new building on Chestnut street (including a duplex pump worth $800) according to verbal specifications given by your architect, for $2300, warranted satisfactory in every respect.

Yours,
ELI THAYER.

Plaintiff in error accepted this proposition. The elevator was substantially finished. It proved to be unsatisfactory. He therefore declined to accept it, and gave notice that he desired it to be removed. This Thayer refused to do; thereupon Singerly took it down, and holds it subject to the order of Thayer. The latter brought this suit, claiming the contract price.

The controlling question is, What meaning and effect are to be given to the words "*warranted satisfactory in every respect?*" Satisfactory to whom? Certainly not to the maker only. Was it to be satisfactory to the person for whom it was to be made and

by whom it was to be used? The learned judge thought this was not a necessary requirement, but if it was built in a workmanlike manner and performed its intended purpose in a manner which ought to be satisfactory to the plaintiff in error, that was sufficient. In other words, it may have been wholly unsatisfactory to him, yet if the jury thought he ought to have been satisfied, he was bound to accept it. In effect, that is, it need not have operated to his satisfaction in any respect, but to the satisfaction of the jury which might be called on to pass on the rights of the parties.

The proposition was made to him to purchase a kind of elevator not in general use. The fair inference is that he desired to purchase one that would be satisfactory to himself. The manifest import and meaning of the language used is that it should be satisfactory to him. This, then, was the agreement. To him alone was the proposition made. It would not have been any clearer had it read, "warranted satisfactory to you in every respect." He, therefore, was the person to decide and to declare whether it was satisfactory. This was a fact which the contract gave him a right to decide. He was the person negotiating for its purchase. He was the person who was to test it and to use it. No other persons could intelligently determine whether in every respect he was satisfied therewith.

McCarren v. *McNulty et al.*, 7 Gray 139, was on an agreement to make a book-case "in a good, strong and workmanlike manner, to the satisfaction of the president of the society," for which it was to be made. It was held not to be sufficient to prove that it was constructed according to the terms of the agreement, without also proving that it was satisfactory to or accepted by the defendant.

When the agreement is to make and furnish an article to the satisfaction of the person for whom it is to be made, numerous authorities declare it is not a compliance with the contract to prove he ought to have been satisfied. It was so held in *Gray* v. *Rd.*, 11 Hun 70, where the contract was for the purchase of a steamboat; in *Brown* v. *Foster*, 113 Mass. 136, where the agreement was to make a suit of clothes; in *Zaleski* v. *Clark*, 44 Conn. 218, on a contract for a plaster bust of a deceased husband of the defendant; in *Gibson* v. *Cranage*, 39 Mich. 49, where a portrait was to be satisfactory to the defendant, and in *Hoffman* v. *Gallagher*, 6 Daly 42, where a portrait of defendant was to be satisfactory to his friends. So where a person got a set of teeth from a dentist

under an agreement that they were to be satisfactory, it was held, in *Hartman* v. *Blackburn*, 7 Pittsburgh Legal Journal 140, that he was made the exclusive judge of their value.

To justify a refusal to accept the elevator on the ground that it was not satisfactory, the objection should be made in good faith. It must not be merely capricious. It is declared in 1 Parsons on Contracts 542, if A. agrees to make something for B., to meet the approval of B., or with any similar language, B. may reject it for any objection which is made in good faith, and is not merely capricious. *Andrew* v. *Belfield*, 2 C. B. (N. S.) 779, is cited to support this view. That case arose on a written agreement to build a carriage, in a manner which should meet the approval of the person for whom it was to be made, not only on the score of workmanship, but also that of convenience and taste. It was held that his rejection, made in good faith, was conclusive.

This "hoist" is unlike those in most general use. They are usually suspended from a wire or rope cable, which may be operated either by water or by steam; this is supported by a single upright iron column made in sections, which run into each other, like the sections of a telescope; it stands under the centre of the car; when the sections are folded closely together the car is at its lowest position; on the water being poured into the sections by a steam pump, the pressure of the water within the column causes the sections to draw out, thereby forcing the car upward, and so sustaining it. When a valve is opened, the water escapes, then the weight of the car and the weight of the upper sections of the column cause the sections to run into each other, and the car descends.

While the evidence is conflicting as to the efficient working of the elevator, and the weight thereof induced the jury to find the elevator ought to have been satisfactory, yet we think there is evidence to show the plaintiff in error acted in good faith and not in mere caprice, in refusing to accept it. We will refer to some. John Doris testifies that he ran this elevator about a month; that he would take it from the first to the sixth floor; it would almost drop from the sixth to the third floor, and then it would almost stop, and then go slowly down; it acted the same whether the steam pressure was great or small, it would start and jump in getting up to where we wanted to go; almost every trip it would drop suddenly from the sixth to the third floor; if we put on a load it would jump all the way up. John Norris, who rode on it four or five times,

says, "it was jerky, and every little period it gave a little jerk, causing your stomach to rise." Albert Merritt testified he had ridden on them, but they were so unsatisfactory and uncertain that he preferred to walk upstairs; they would stick both going up and coming down. He had one of the same kind, which he says was not entirely completed, although two or three months were occupied in trying to put it in order; he "considers them the biggest frauds he ever saw in the elevator line." S. Lloyd Wiegand, a mechanical engineer of twenty-eight years experience, testifies that a building of moderate height can use them very well; it don't work well in a tall building." Hale, the architect of the building, rode on it and saw it often. He says, it did not run smoothly; at the end of every section it would give a jerk and a click. He examined this and others of the same kind to report to the plaintiff in error, and "came to the conclusion that it would never do as a passenger elevator on which ladies were to ride." He informed the agent of the contractor that the elevator was a failure. Plaintiff in error also testifies to its jerking and irregular motion, being such as to scare him, and his fear of an accident; of notice to the agent that it was unsatisfactory; and of his offer to give $500 if he would take it out.

It may have been very unwise in the maker of this elevator to agree to expend labor and furnish materials and rely for payment on the uncertain approval of one so largely interested in determining whether it was satisfactory to himself. Having, however, entered into a contract whereby he did run this risk, his legal rights are to be determined thereby; *McCarren* v. *McNulty et al.*, *supra*. In *Nelson* v. *Von Bonnhorst*, 5 Casey 352, one gave a written instrument under seal admitting an indebtedness to another in a specific sum, which he agreed "to pay whenever, in my opinion, my circumstances will enable me to do so." It was held that the instrument imposed no legal obligation which could be enforced by action, as the maker was the sole judge of his ability. In that case there was an unquestioned indebtedness to be discharged by the payment of money. Every other person might swear the circumstances of the debtor made him abundantly able to pay, yet that did not determine his legal liability.

It is claimed that the elevator was rejected before it was finished, and, if time had been given, it would have been made satisfactory. If, in fact, it was rejected before it was substantially completed, so

that the plaintiff in error could not reasonably determine whether it was or would be satisfactory to him in all respects, then his rejection was prematurely made, and, under the pleadings, would not constitute a bar to the action. If, however, it was sufficiently completed so he could understand how it would operate, he was not bound to wait an unreasonable time for the entire completion of some minor things.

In so far as the specifications of error are in conflict with this opinion, they are not sustained.

Judgment reversed and a *venire facias de novo* awarded.

A high authority, Dr. Wharton, (Contracts sect. 289, note) criticises the book-case case, cited in the foregoing opinion, and the case of *Atkins* v. *Barnstable*, to be noticed further on, as going "too far in leaving the matter to the purchaser's caprice." Still we believe that the opinion of MERCUR, C. J., lays down the reasonable, as well as the actual rule. For it must be borne in mind that the law assumes not to make contracts, but to enforce them according to what the parties intended, according to the ordinary meaning of words. If the parties choose to make a hard contract, that is their own lookout.

A word or two more may be said as to some of the authorities cited in the principal case.

In *Gray* v. *Railroad* the steamboat was to be taken, "provided upon trial, they (the purchasers) are satisfied with the soundness of her machinery."

The plaster-bust case is a very strong one. The order was taken by the sculptor's agent, who assured Mrs. Clark that she need not take the bust unless satisfied with it. Mrs. Clark visited the studio more than once while the work was in progress, and made some suggestions which the artist carried out. The lack of proper life-like expression, which was the objection to the bust, appeared to be not the artist's fault, but owing to the nature of the bust as a dead-white model. Here was a case of capricious dissatisfaction if ever one there was; but as the court pithily said, the contract was not to make a bust that she ought to, but one that she would, be satisfied with.

In *Brown* v. *Foster* evidence was given of the custom among tailors, that clothes should be sent back for alteration if they did not fit. The defendant was called upon to try on the clothes in court, and several tailors testified that a few alterations would make them right; but the contract was for a suit to be ready at a certain day, and the court refused to interfere. Leaving now the cases adduced by MERCUR, C. J., in *Atkins* v. *Barnstable*, 97 Mass. 428, one of the cases which Dr. Wharton objects to, the contract was for work to be done "to the acceptance of the county commissioners." In *Barlow* v. *Thompson*, 46 Ind. 384, water-wheels were to work to the "entire satisfaction" of the purchaser.

In *Harris* v. *Miller*, 6 Saw. 319, under an agreement that they should have a bond "to their satisfaction," defendants were held to be justified in refusing plaintiff's own bond, and demanding a bond with sureties; but this case is not as strong as are the others, other circumstances beside the tenor of the contract rendering a bond with sureties proper.

In an English case, *Roberts* v. *Smith*, 4 H. & N. 315, the plaintiff was to be engaged at a certain salary, as secretary of a company about to be formed; in case the company was not formed he was

to receive for his time and labor expended, such remuneration as the defendant might deem right. The company was not formed, and the plaintiff brought suit for his compensation. The court decided that there was no contract such that he could recover upon, and MARTIN, B., said: "The argument that, as a matter of law, the plaintiff is entitled to be paid, is incorrect; it is by no means a matter of law that a person shall be paid for his services—it is a matter of contract." Other members of the court alluded to the probability that the plaintiff was willing to take the chance of losing all compensation, to ensure his position in case the company should be organized. And on this subject a recent English author (Pollock on Contracts, p. 44) remarks: "A promise of this kind, though it creates no enforceable contract, is so far effectual as to prevent the promisee from falling back on any inferred contract to pay a reasonable remuneration."

In *Hartford Co.* v. *Brush*, 43 Vt. 528), the sale was of a patent sugar evaporator, which the defendant was to take if he liked it. It was in evidence that the defendant was sick during most of the time the apparatus was being tested, and his objections were derived from the reports of the workmen under him. The jury found for defendant, and their judgment was sustained on appeal, the court saying that "honesty of purpose," absence of "wilful caprice," or "dishonorable design" were all that could be required. In almost all the cases this element of *good faith* is spoken of as necessary on the part of the party refusing the article. At this point the inquiry suggests itself: How is this question of good faith to be determined? Is not good faith, like everything else in the contract, at the option of one party? There is some difficulty here. The best answer is to be found in the language of a case which well illustrates the whole subject: *Daggett* v. *Johnson*, 49 Vt. 345. "He (the buyer) must act honestly and in accordance with the reasonable expectations of the seller *as implied from the contract.*" (The italics are ours.)

The sale in this case was of a set of patent milk-pans, for which the buyer was to pay "if satisfied with the pans." The peculiarity of the pans was that they were to be used in a certain manner, with running water about them to graduate the temperature of the milk. The buyer used them like ordinary pans, which was of course no test, and then declared himself dissatisfied with them. It was adjudged that he must pay for them. "His dissatisfaction," it was said, "must be actual, not feigned." But it must be presumed from the analogy of the decisions reviewed in this note, that if the buyer had used the pans in the manner the contract contemplated, the court would not have made inquiry into the degree or the reality of his objections.

One case only has been found opposing this line of decision (*Folliard* v. *Wallace*, 2 Johns. 395), a contract for the purchase of real estate, for which the buyer was to pay after he was well satisfied the title was undisputed and good against all other claims. Payment was refused on the ground of an outstanding claim of title, but it was shown that this claim was unsound and the title really good. Chancellor, then Ch. Justice KENT, after showing the clearness of the title, said: "Nor will it do for the defendant to say he was not satisfied with his title without showing some lawful incumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded. If the defendant were left at liberty to judge for himself when he was satisfied, it would totally destroy the obligation, and the agreement would be absolutely void. * * * This law in this case will determine for the defendant when he ought to be satisfied."

This authority is certainly opposed to the principal case, although its force may

be lessened by the fact that the question in the case, the title to land, is one which is peculiarly within the power and duty of a court to determine.

Singerly v. *Thayer*, and the cases in accord with it, become clearer when they are put in contrast with others where the right of decision is not vested absolutely and even arbitrarily in a party to the contract.

The agreement in *Cummer* v. *Butts*, 40 Mich. 322, was for selling lumber on commision, and might be cancelled by either party "for good cause." One party became dissatisfied and ended the contract. The court below allowed the question of good cause to go to the jury. The Appeal Court reversed the judgment because it was impossible to reduce the phrase "good cause," to any legal certainty.

In *Mueller* v. *U. S.*, 19 Court of Claims 581, the agreement was to furnish building stone "at such times and in such quantities as may be required by the government." The government, contemplating a change of plan, broke off the work, causing heavy loss to the contractor. The court said that the word *required*, referred not to the unsettled purposes of the government, but to the needs of the work contemplated by the contract. In other words the working of the contract conferred no arbitrary power of refusing the stone.

In *McClamrock* v. *Flint*, 101 Ind. 278, a mill was sold on condition of return if it did not "work well." It was held necessary to state wherein the machine did not work well, because, as the court observed, "a defendant who alleges that a mill or machine does not work well simply states his own judgment." See also *Clark* v. *Rice*, 46 Mich. 308.

Between a case like this and the principal case, the distinction is plain. In the former case the sufficiency of the article, the subject-matter of the contract is a matter of fact, to be settled as questions of fact are settled—the case is one of warranty; in the latter case the sufficiency of the article is left to the judgment, call it the caprice if you will, of one party to the contract. It is a question of what the ordinary meaning of words is. The word *satisfactory*, for instance, which has been found to occur so often, has in common acceptation a subjective meaning, a reference to the attitude of the mind towards a thing, and not to the intrinsic merit of a thing.

The losing sight of the distinction between a contract, the decision of which rests with the parties, and one the decision of which devolves upon the court and jury, is at the bottom of all the trouble in the class of cases before us.

The rule laid down in the text covers the numerous instances of contracts where the judgment of a supervising architect or other expert is final as to work done, as in *Dingley* v. *Greene*, 54 Cal. 333; *Schenke* v. *Rowell*, 7 Daly (N. Y.) 286; *Kane* v. *Stone Co.*, 39 Ohio St. 1; *Hartupee* v. *Pittsburgh*, 97 Penn. St. 107; *Kihlberg* v. *United States*, 97 U. S. 398; *Sweeney* v. *United States*, 109 Id. 618; *Cass* v. *Railroad*, 80 Penn. St. 31. At least one decision, however, denies the finality of the architect's decision: *Hurst* v. *Litchfield*, 39 N. Y. 377.

A somewhat curious point is decided in *Tetz* v. *Butterfield*, 54 Wis. 242. The work was to conform to the specifications, etc., "according to the full satisfaction of W. D., architect, and to the satisfaction of the owner." It was considered that the last clause was meant only to prevent any change of plan without sanction of the owner; as to the quality of the work the architect alone was to judge.

Another class of cases arises on contracts to build railroads where the amount of grading, etc., done is to be estimated finally by the company's engineer. In England, no agreement can shut out the jurisdiction of equity to correct erroneous statements, while here it is usually

held that an estimate in good faith is final. *Scott* v. *Avery*, 5 House of Lords 811; *Herrick* v. *Railroad*, 27 Vt. 673; *Hennessey* v. *Farrell*, 4 Cush. 267; *Condon* v. *Railroad*, 14 Gratt. 302; *Alton Rd.* v. *Northcott*, 15 Ill. 49. One case at least, however (*Kistler* v. *Railroad*, 88 Ind. 460), rules that any agreement not to resort to legal proceedings is against the policy of the law. But the case arose on an under-estimate of work done—a simple question of fact.

CHARLES CHAUNCEY SAVAGE.
Philadelphia.

Supreme Court af Indiana.

HEDDERICK *v.* SMITH.

A tenant who, for the better enjoyment of the leasehold, erects thereon buildings, may, at any time before his right of enjoyment ceases, remove such buildings, if the removal can be accomplished without permanent injury to the freehold.

If he neglects to remove them during his rightful continuance in possession, unless his right to do so afterwards is reserved by agreement with the landlord, he is presumed to have abandoned them, and his right ceases.

If the tenant take a new lease from the landlord without reserving the right to remove the buildings placed by him on the demised premises for his own enjoyment, he cannot at the expiration of such new term remove such buildings.

A mere extension, however, of the old lease upon the same terms will not conclude his right to remove such buildings; and the respective rights of the parties will remain the same.

APPEAL from the Marion Superior Court.

P. Rappaport, for the appellant.

F. S. Rollins, for the appellee.

The opinion of the court was delivered by

MITCHELL, C. J.—Elizabeth D. Smith, as owner of certain premises in the city of Indianapolis, brought this suit against Hedderick who was in possession, to restrain him from removing therefrom a "club house," which had been erected thereon, and other alleged fixtures, which, it was claimed, were a part of the freehold. The case was put at issue and tried by the court, the result being a finding and judgment for the plaintiff below. On appeal to the general term, the only error assigned was that the court, at special term, erred in overruling the appellant's motion for a new trial. Under the settled practice no alleged errors will be considered here, except such as were assigned at the general term: *Miller* v. *State*, 61 Ind. 502.